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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949

No. 844

LOEW'S INCORPORATED,
Appellant,

against

UNITED STATES OF AMERICA,
Appellee,

and

WARNER BROS. PICTURES, INC., *et al.*,
Defendants.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner, Loew's Incorporated, prays that this Court grant re-hearing of its order entered June 5, 1950, which affirmed on its own motion, without hearing or without briefs, a judgment of the District Court, and petitioner further prays that this Court grant opportunity for oral hearing and filing of briefs before disposing of this appeal.

Reasons for Granting Rehearing

This Court has summarily affirmed a judgment of the District Court which decreed that petitioner can no longer both produce and exhibit motion pictures, a business in which petitioner has been engaged for over 30 years.

The District Court entered the decree dissolving this long-standing enterprise purportedly in compliance with principles for the legality of vertical integration set forth in the opinion of this Court on a prior appeal (334 U. S. 131). Loew's does not question the soundness of these principles and it was not the purpose of this appeal nor is it the purpose of this application for rehearing so to do.

Moreover, petitioner fully recognizes the necessity of the Court's sifting frivolous from meritorious appeals and, more

particularly, of disposing summarily of many cases which are adequately governed by principles of law set forth in prior decisions of the Court. This case, however, stands on a wholly different footing.

The substance of the present appeal, apart from the important questions of law noted in petitioner's Jurisdictional Statement, is that the evidence, both before and after the remand, is wholly insufficient under the tests laid down by this Court, to warrant either the dissolution of this company or the perpetual prohibition against its engaging in production and exhibition of pictures, and, more particularly, that the new findings upon which the District Court purportedly based this far-reaching decree are utterly without support in the record as far as Loew's is concerned.

These matters presented on this appeal, going to the very heart of this serious litigation, were not and could not have been before this Court on the prior appeal. Indeed this Court was careful to point out when the case was sent back to the District Court:

> "What findings would be warranted after such an inquiry in the present cases, we do not know." (334 U. S. at 172)
>
> "These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. * * * it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand." (334 U. S. at 174)
>
> "* * * the District Court should be allowed to make an entirely fresh start on the whole of the problem." (334 U. S. at 175)

It is obvious from the foregoing that this Court did not send the case back merely for a ministerial act on the part of the District Court. On the contrary it directed a thorough consideration of the merits. As a consequence, Loew's sub-

mitted substantial and decisive new evidence demonstrating that its integration has not had, and cannot have, any exclusionary effect on competitors in the exhibition and distribution of motion pictures.

While the District Court has ruled against the petitioner in this regard, on these entirely new and all important points Loew's has had no appeal to this or any other Court. Moreover, under the Expediting Act the present appeal is Loew's only appellate remedy.

Where a decree such as this strikes down a business of making and showing pictures, jeopardizing the livelihoods and investments of thousands, this Court in good conscience should not dispose of the appeal on its own motion, without oral argument, without briefs or without adequate opportunity itself to examine this new record.

At this time the motion picture industry is in a recognized decline. The number of pictures which producers are permitted to release in foreign territories is severely restricted. The rental for the films can only be withdrawn from those territories on a very limited basis, thus greatly reducing the possible revenue for every picture and in turn limiting the amount available for new productions. Complete and permanent dissolution of Loew's as a producing-exhibiting unit, which has here been decreed, will definitely compel a material curtailment in making the superior quality motion pictures for which this company has become world-famous over the years.

The District Court's decision that Loew's must separate its production-distribution activity from exhibition was based for the most part upon its new findings after remand that "the theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Anti-Trust Act" and "were a means of carrying out the restraints and conspiracies" (New Finds. 43, a and 147, b).

These findings, which were made without any new evidence to support them, are directly contrary to the finding of fact after the first trial that "the illegalities and restraints

herein found are not in the ownership of" theatres by the producer-distributors, and "these practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor-defendants and their subsidiaries have owned" theatres (Old Find. 154; underscoring added).

The District Court flatly admitted the absence of evidence in either the new or the old record to support its complete about-face, for in defense of its arbitrary action it said: "* * * this [earlier] finding was made because of our view that the competitive bidding system, when coupled with injunctions, would terminate the illegalities * * *" (District Court's Opinion After Remand; p. 31 of Jurisdictional Statement).

Surely rejection of future relief, i.e. compulsory competitive bidding (which this Court disapproved as an appropriate remedy) affords no ground for a new and directly contrary finding of "fact" as to past conditions. Yet, on no more substantial finding does this far-reaching decree of dissolution rest.

The foregoing, of course, is just an indication of the specious character of these new findings. An appraisal of pertinent facts in both the new and old record is required to fully appreciate the seriousness and extent of the error which has been committed by the District Court.

Loew's does not contest, nor does it appeal from, any of the provisions of the District Court's decree enjoining price-fixing, unreasonable clearances, joint ownership of theatres, pooling agreements, etc. The appeal is not on the ground that the District Court has abused its discretion in the manner in which it framed the decree.

The only question on this appeal is whether Loew's business of producing and exhibiting motion pictures, which it has done over the past 30 years, shall be permitted to continue. The District Court's unreversed findings of fact show that Loew's operates only 131 of the 18,076 theatres in the country. These Loew's operated theatres are located in 42

of the larger cities across the United States and represent but 1/10th of the theatres formerly operated by Paramount Pictures Inc. and less than 1/4th of the 640 theatres which the New Paramount Theatre Company is permitted to operate with the sanction of its Government consent decree; and these 131 Loew's Theatres compare with 501 Warner and 636 Fox.

Loew's has, and has had, absolutely no closed towns. In every place where Loew's operates there have been, and still are, other competing first-run theatres.

On the distribution side, the unreversed findings of fact show that in the 1943-1944 season Loew's distributed 33 films, or about 9% of the full-length feature films distributed in this country.

None of these figures approaches monopolistic proportions. It is inconceivable in the light of these facts that Loew's Incorporated, which has been operating as a vertically-integrated unit for these 30 years, should have to completely and forever separate its production from its exhibition business.

CONCLUSION

We respectfully submit that this Court should grant re-hearing of its summary order of June 5th and should afford opportunity for oral hearing and filing of briefs before disposing of this appeal.

Respectfully submitted,

JOHN W. DAVIS,
J. ROBERT RUBIN.

June 19th, 1950.

(OVER)

CERTIFICATE OF COUNSEL

We hereby certify that we are counsel for the petitioner herein and that the foregoing petition for re-hearing is in our opinion well founded in law and fact, is proper to be filed herein, and is presented in good faith and not for delay.

JOHN W. DAVIS

J. ROBERT RUBIN

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